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No. 01-896

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY AND
CITIBANK (SOUTH DAKOTA), N.A.,

Petitioners,

v.

JOHN B. MCCAULEY *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Is there appellate jurisdiction when petitioners, as the nominally prevailing party in the district court, appeal the district court's dismissal of the complaint for lack of subject matter jurisdiction?

CORPORATE DISCLOSURE STATEMENT

Ford Motor Company has no parent corporation, and no publicly held company owns ten percent or more of its stock. Citibank (South Dakota), N.A., is a wholly-owned subsidiary of Citibank, N.A., and is indirectly wholly-owned by Citigroup Inc. Citigroup Inc. is a publicly held company.

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INTRODUCTION

This case began as six different state court actions filed against one or both petitioners. Invoking the protection of the diversity statute, petitioners removed the cases to federal court. The cases were then transferred and consolidated in the Western District of Washington pursuant to the multidistrict litigation statute. Following transfer, respondents voluntarily filed a single federal Consolidated Complaint that differs significantly from the underlying state court complaints and affirmatively asserts federal diversity jurisdiction.[1]

Following pleading, discovery, and motions practice regarding class certification and dismissal, the district court *sua*

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[1] Although named as a defendant in the Consolidated Complaint, petitioner Citibank was not a defendant in three of the state court actions. *Compare* J.A. 51 *with* complaints in *Copeland* v. *Ford Motor Co.*, No. CV-97-970, ¶ 2 (Ala. Cir. Ct. filed Sept. 2, 1997) ("Ala. Compl."); *Essig* v. *Ford Motor Co.*, No. 97-18514, ¶ 5 (N.Y. Sup. Ct. filed Aug. 1, 1997) ("N.Y. Compl."); *and La Grou* v. *Ford Motor Co.*, No. BC180583, ¶ 2 (Cal. Super. Ct. filed Oct. 31, 1997) ("Cal. Compl."). In addition, the Consolidated Complaint does not include as parties any of the named plaintiffs from two of the state court actions. *Compare* J.A. 50-51 *with* Ala. Compl. ¶ 1 *and* complaint in *Merrick* v. *Ford Motor Co.*, No. 9708-06079 (Or. Cir. Ct. filed Aug. 4, 1997) ("Or. Compl."). Only two state court complaints sought specific performance of the Rebate Program (which they sought only as an alternative to compensatory damages), *see* complaint in *Hornreich* v. *Ford Motor Co.*, No. 97-2-16935, Prayer for Relief (Wash. Super. Ct. filed July 7, 1997) ("Wash. Compl."); Or. Compl. ¶¶ 1-12, and one disclaimed injunctive relief altogether, *see* Ala. Compl. ¶ 9. The Consolidated Complaint alleges three causes of action—breach of contract, violation of consumer protection statutes, and unjust enrichment, *see* J.A. 57-62; not all state court complaints asserted such claims, *see, e.g.*, N.Y. Compl. ¶¶ 20-30; Cal. Compl. ¶¶ 1-26; complaint in *McCauley* v. *Ford Motor Co.*, No. 97L 008315, Counts I, II (Ill. Cir. Ct. filed July 14, 1997). Moreover, several state court complaints alleged claims abandoned by the Consolidated Complaint; for example, plaintiffs in the California action asserted a promissory estoppel claim and plaintiffs in the Washington action asserted a conspiracy claim. *See* Cal. Compl. ¶¶ 24-26; Wash. Compl. ¶¶ 57-60. Petitioners understand that these complaints are part of the underlying record in the Court's possession, but will lodge them upon request.

sponte (and over petitioners' opposition) dismissed the Consolidated Complaint for failure to satisfy the amount-in-controversy requirement. Unless reversed, the district court's order means that state court actions will proceed, unconsolidated, in several different States, leaving petitioners with substantial additional burdens and no recourse to the protections the diversity statute affords to out-of-state litigants.

On those facts, the question the Court has now asked the parties to brief can fairly be phrased as follows: whether the district court's determination that petitioners are not entitled to adjudication of respondents' Consolidated Complaint in a single federal forum, but instead must face multiple suits in home-state-court forums, imposed an injury on petitioners sufficient to sustain appellate jurisdiction. Viewed that way, appellate jurisdiction follows as a matter of course.

Respondents effectively concede as much, going so far as to contend that petitioners did not even "prevail" in the district court, because petitioners "urged the court to retain jurisdiction, and the district court declined to do so."[2] While it is in fact correct to say, as the Court's question reflects, that petitioners "prevailed" in the sense that the complaint against them was dismissed, it is equally correct to say, as the Court's question also reflects, that petitioners' "victory" was "nominal[]" at best. "Pyrrhic" is an apt description.

This Court's cases uniformly recognize that a party may appeal a judgment nominally in its favor, where, as here, that judgment also imposes some detriment sufficient to create a genuine "stake in the appeal." If petitioners are correct in their view of the principal question of diversity jurisdiction presented here, the judgment of dismissal in this case deprived them of their right to litigate this case to a final adjudication in federal court. That deprivation plainly constitutes a sufficient stake to sustain appellate jurisdiction.

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[2] *See* Letter from Steve W. Berman, respondents' counsel of record, to Denise McNerney, Merits Clerk, Supreme Court of the United States, dated September 13, 2002 (App. 1a).

ARGUMENT

PETITIONERS, THOUGH NOMINALLY PREVAILING IN THE DISTRICT COURT, MAY APPEAL THE DISMISSAL OF THE CONSOLIDATED COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION.

1. It is common ground that "appellate jurisdiction over final decisions does not turn on which side prevailed in the District Court." *United States* v. *Jose*, 519 U.S. 54, 57 (1996) (per curiam). Instead, "[f]ederal appellate jurisdiction is limited by the appellant's personal stake in the appeal." *Deposit Guaranty Nat'l Bank* v. *Roper*, 445 U.S. 326, 336 (1980). Even a party that has "prevailed on the merits" may be sufficiently aggrieved by the district court's judgment to "retain[] a stake in the appeal." *Id.* at 333-34; *see also Forney* v. *Apfel*, 524 U.S. 266 (1998); *Jose*, 519 U.S. at 57; *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241 (1939). That is so because a party may "prevail" below, but still receive less than "all that he has sought." *Roper*, 445 U.S. at 333.

Thus the question presented is not answered by the mere fact that petitioners were the "nominally prevailing party" in the district court. The dispositive issue is whether petitioners have a "sufficient stake in the appeal," notwithstanding dismissal of the case. The answer to that question is yes.[3]

In *Deposit Guaranty National Bank* v. *Roper*, this Court concluded that plaintiffs in whose favor judgment had al-

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[3] That the district court's order purportedly dismissed the "consolidated complaint" rather than the "action" does not by itself raise jurisdictional concerns. As the Ninth Circuit noted, "[i]f it appears that the district court intended the dismissal to dispose of the action, [an order dismissing the complaint] may be considered final and appealable." J.A. 111 (quoting *Hoohuli* v. *Ariyoshi*, 741 F.2d 1169, 1171 n.1 (9th Cir. 1984)); *see also Amazon, Inc.* v. *Dirt Camp, Inc.*, 273 F.3d 1271, 1275 (10th Cir. 2001) (same). As the Ninth Circuit found, "the record clearly indicates that the district court intended to dispose of the consolidated action." J.A. 112.

ready been rendered retained a "sufficient stake" to appeal denial of an earlier motion for class certification because certification would permit them to share more widely the litigation costs they had incurred. *See* 445 U.S. at 334 n.6, 336. In *Forney* v. *Apfel*, the Court permitted a Social Security claimant who had sued for disability benefits or, alternatively, for further administrative proceedings on her claim, to appeal from an order directing the very administrative remand she had requested; the Court unanimously concluded that this alternative relief exposed her to "further delay and risk" by requiring her to engage in further litigation, and that this detriment constituted a "sufficient stake" to appeal. 524 U.S. at 271. In this case, petitioners' "stake" in appealing the order dismissing the Consolidated Complaint easily surpasses the standard reflected in *Roper* and *Forney*.

2. Petitioners were palpably aggrieved by the district court's determination that litigation against them could not proceed in federal court. For one thing, the non-preclusive dismissal denied petitioners the final adjudication they sought, thereby subjecting them to repetitive litigation of the plaintiffs' claims in multiple forums. For another, it deprived petitioners of their statutory right to a federal forum. Either of these deprivations constitutes a sufficient stake for appellate jurisdiction.

a. Because the district court dismissed the Consolidated Complaint without the final adjudication petitioners sought, petitioners will be forced to bear the considerable expense of defending themselves in multiple and potentially overlapping actions in state courts across the country, instead of in a single consolidated proceeding.

The lower courts have held with near unanimity that a federal court's dismissal of state-law claims without prejudice thereafter to litigate those claims in state courts leaves the defendant "aggrieved in a practical sense," *LaBuhn* v. *Bulkmatic Transport Co.*, 865 F.2d 119, 122 (7th Cir. 1988) (Posner, J.), because it does not eliminate the risk of further

litigation. For example, in *Disher* v. *Information Resources, Inc.*, 873 F.2d 136, 138-39 (7th Cir. 1989), Judge Posner held for the Seventh Circuit that a defendant could appeal a dismissal without prejudice of plaintiffs' state-law claims for lack of subject matter jurisdiction because such a dismissal exposes defendant to the "risk . . . of further litigation" in state court and, thus, "is not entirely in the defendant's favor any more than a judgment for $1 million would be entirely in favor of a plaintiff who believed he was entitled to a judgment for $1,236,000." *Id.* at 138. The Tenth Circuit recently reached the same conclusion in *Amazon, Inc.* v. *Dirt Camp, Inc.*, 273 F.3d 1271, 1275 (10th Cir. 2001), when it considered *sua sponte* whether a defendant could appeal a dismissal without prejudice of plaintiffs' state-law claims for lack of subject matter jurisdiction:

> Here, [defendant] sought final disposition on the merits as to all claims, but the district court granted summary judgment only on the federal claim. The court dismissed without prejudice the state law claims. As a result, [defendant] received only a part of what it sought. This disposition left [defendant] open to precisely what happened in this case, a second litigation. [Defendant] was sufficiently aggrieved by this result, and consequently has standing to appeal.

Id. at 1275-76 (citations omitted). Other courts are in accord. *See, e.g.*, *Cella* v. *Togum Constructeur Ensemleier en Industrie Alimentaire*, 173 F.3d 909, 911-12 (3d Cir. 1999) (defendant may appeal dismissal of complaint for lack of subject matter jurisdiction, since it does not leave defendant "completely free from suit but rather . . . require[s defendant] to defend this suit in state rather than federal court"); *LaBuhn*, 865 F.2d at 122 (dismissal without prejudice for lack of subject matter jurisdiction leaves defendant "aggrieved in a practical sense" because "plaintiff remains free to refile his suit in state court"); *Jarvis* v. *Nobel/Sysco Food Servs. Co.*, 985 F.2d 1419, 1424-26 (10th Cir. 1993) (holding defendant may

appeal dismissal without prejudice for lack of subject matter jurisdiction); *Custer* v. *Sweeney*, 89 F.3d 1156, 1163-64 (4th Cir. 1996) (holding that defendant had standing to appeal dismissal without prejudice of state-law malpractice claim for lack of subject matter jurisdiction because dismissal would force defendant "to incur considerable expense relitigating" claim in state court).[4]

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[4] *See also H.R. Techs., Inc.* v. *Astechnologies, Inc.*, 275 F.3d 1378, 1381-82 (Fed. Cir. 2002) (upholding appellate jurisdiction; "without-prejudice dismissal subjects [defendant] to further litigation and thus is not entirely in its favor, just as a judgment awarding money damages is not entirely in favor of plaintiff who had sought a larger award"); *Texas Cmty. Bank, N.A.* v. *Missouri Dep't of Social Servs.*, 232 F.3d 942, 942-43 (8th Cir. 2000) (defendant may appeal decision to abstain; "Abstention in deference to state proceedings does dispose of the federal case, but without prejudice: there remains the possibility that the bank could refile its federal claim"); *Sea-Land Serv., Inc.* v. *Department of Transp.*, 137 F.3d 640, 647 n.4 (D.C. Cir. 1998) ("[a] prevailing party may appeal a dismissal without prejudice on the grounds that it wants one with prejudice"(citation omitted)); *Farmer* v. *McDaniel*, 98 F.3d 1548, 1549 (9th Cir. 1996) (upholding appellate jurisdiction; defendant "did not get all that it wanted—dismissal with prejudice of claims asserted for abuse of the writ—but instead faces the prospect of further litigation on these claims in a different forum"); *Kirkland* v. *National Mortgage Network, Inc.*, 884 F.2d 1367, 1369-70 (11th Cir. 1989) ("district court's order granting voluntary dismissal without prejudice . . . is final and appealable by defendant" (citation omitted)).

The only authority suggesting anything to the contrary is *Concerned Citizens of Cohocton Valley, Inc.* v. *New York State Department of Environmental Conservation*, 127 F.3d 201 (2d Cir. 1997), which involved a plaintiff who, while seeking a determination that that federal law *did not preempt* certain state law, asserted federal jurisdiction under the doctrine of "complete preemption," arguing, on the contrary, that federal law *did preempt* the state law. In denying appellate jurisdiction, the Second Circuit merely held that, in such circumstances, a defendant was not "aggrieved" when the district court found no federal jurisdiction over the inherently self-contradictory complaint. *Id.* at 204. The rationale of *Cohocton*, however, does not extend to cases in which, as here, subject matter jurisdiction is premised on the diversity statute. *See* 28 U.S.C. § 1332. The Second Circuit's subsequent decision in *Gutierrez* v. *Fox*, 141 F.3d 425 (2d Cir. 1998) (in which the court adjudicated a defendant's appeal

The practical injury inflicted by the dismissal is serious. Petitioners have already incurred significant costs litigating the claims in the district court. Among other things, the parties have fully litigated motions to dismiss the Consolidated Complaint, and petitioners have submitted lengthy answers to that complaint. J.A. 4-7. In addition, the parties have fully briefed and argued the issue of class certification, and there has been extensive discovery on that issue. J.A. 9-20, 41-42. The district court's dismissal without prejudice means much of that work would have to be repeated—and not in just one consolidated action, but in numerous different actions in numerous different state venues. Those proceedings will inevitably proceed at different paces and impose different and possibly conflicting obligations on the petitioners. The lack of any state-level mechanism comparable to the Judicial Panel on Multi-District Litigation to permit "cross-state" pre-trial consolidation of these cases, *cf.* 28 U.S.C. § 1407, compounds the harm inflicted on petitioners by the district court's dismissal of the Consolidated Complaint. The overall practical injury imposed by the judgment of dismissal could hardly be clearer.

b. Dismissal for lack of subject matter jurisdiction also denies petitioners their statutory right to a federal forum. The central question presented in this appeal is whether the diversity statute provides petitioners a federal forum for litigation of the claims against them. The very purpose of the diversity statute is to provide "non-resident litigants . . . courts free from susceptibility to potential local bias." *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 111 (1945); *see Lumbermen's Mut. Cas. Co.* v. *Elbert*, 348 U.S. 48, 54 (1954)

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of a *sua sponte* dismissal of a federal diversity-based complaint, even following a jury verdict against him), underscores this point. In any event, *Cohocton* predates this Court's ruling in *Forney* and did not consider that a dismissal not on the merits: (1) constituted less relief than the defendant sought; and (2) exposed the defendant to the additional economic burden of litigating in another forum.

(Frankfurter, J., concurring). To avoid being subjected to such potential local bias, the diversity statute affords non-resident plaintiffs the right to bring their state-law claims against local defendants on the neutral ground of federal court, and (in conjunction with the removal statute) affords defendants haled into a foreign state court the concomitant right to have claims *against* them heard in federal court.[5] The district court's dismissal order caused petitioners injury by depriving them of that right, forcing them to face plaintiffs in the courts of plaintiffs' own home states.

This Court has previously recognized that the loss of the right to an adjudication in the forum of one's choice is a cognizable legal injury. In *International Primate Protection League* v. *Administrators of Tulane Educational Fund*, 500 U.S. 72, 77 (1991), this Court permitted plaintiffs to appeal removal of their state complaint to federal court even though they lacked standing to litigate any of the substantive claims they raised. Nonetheless, this Court held, "[p]etitioners' injury is clear, for they have lost the right to sue in Louisiana court—the forum of their choice." *Id.*; *see id.* at 78 ("The 'adverseness' necessary to resolving [appeal of] the removal question is supplied . . . by petitioners' desire to prosecute their claims in state court." (footnote omitted)).

Just the same is true here. The judgment of dismissal deprived petitioners of their right under the diversity statute to defend against plaintiffs' claims in the neutral forum of a federal court. That gives them a sufficient—indeed, quite fundamental—stake in these appellate proceedings. *See, e.g.*, *Cella*, 173 F.3d at 911-12 (relying on *International Primate* to conclude that defendant's interest in a federal forum con-

[5] *See Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 356 (1988) (exercise of diversity jurisdiction invoked by defendant "is not discretionary"); *cf. Donald* v. *Philadelphia & Reading Coal & Iron Co.*, 241 U.S. 329, 332 (1916) (invalidating state law interfering with right of non-resident defendant to invoke diversity jurisdiction of federal court); *Harrison* v. *St. Louis & San Fran. R.R.*, 232 U.S. 318, 330-31 (1914) (same).

stituted sufficient stake to appeal dismissal of complaint predicated on diversity jurisdiction). Appellate jurisdiction is therefore proper for this additional reason.[6]

3. The propriety of appellate jurisdiction in this case can readily be seen by considering how matters would appear if this litigation had been precipitated not by respondents demanding specific performance of the Rebate Program, but rather by its functional equivalent—a suit by petitioners seeking a declaratory judgment that they had lawfully terminated the Program. Had the district court dismissed *that* complaint for lack of subject matter jurisdiction, there could be no doubt whatsoever that petitioners would have a sufficient

[6] It would be incorrect to argue that the bar to appealing a *remand* order in the removal context, *see* 28 U.S.C. § 1447(d), reflects a broader congressional understanding that deprivation of the defendant's statutory right to a federal forum—even by a *dismissal* order—does not impose injury sufficient to create a genuine stake in the appeal. If anything, § 1447(d) proves exactly the opposite—the statute plainly presupposes that a determination that a case cannot proceed in federal court imposes a cognizable legal injury on the party that wants the protection of the federal forum. If the general rule were otherwise, the statutory bar to appeal would be entirely unnecessary. Indeed, not even all *remand* orders are non-appealable under § 1447(d)—only those that are based on technical defects in the removal or on lack of subject matter jurisdiction. *See Thermtron Prods., Inc.* v. *Hermansdorfer*, 423 U.S. 336, 346-52 (1976); *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 714-15 (1996) (remand orders subject to appellate review under *Thermtron* are appealable final orders under § 1291). *Thermtron* and *Quackenbush* confirm Congress's judgment that an order depriving a party of a federal forum is an appealable order, unless the order not only is a remand order, but one that strictly satisfies the conditions set forth in the removal statute. Here, of course, the order was not a remand at all, but a dismissal of a new federal court complaint. Accordingly, what operates is not § 1447(d)'s specific proscription against appellate review of remand orders, but the general background presumption that deprivation of a defendant's asserted right to a federal forum imposes a harm sufficient to support appellate jurisdiction.

"stake" to support appellate jurisdiction. In every meaningful sense, the case in its present posture is no different.[7]

CONCLUSION

For the foregoing reasons, the court of appeals properly asserted jurisdiction over petitioners' appeal from the dismissal of the Consolidated Complaint for lack of subject matter jurisdiction.

Respectfully submitted,

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SEPTEMBER 2002

[7] *Compare* Resp. Br. 32 n.21 (arguing that the "controversy" in this case would be the same if petitioners had sought a declaratory judgment validating their right to terminate the Rebate Program) *with* Pet. Reply Br. 10 (agreeing on this point). *See also* Brief of the United States as *Amicus Curiae* at 12-13 (same).

APPENDIX

APPENDIX

[Steve W. Berman letterhead]

September 13, 2002

Ms. Denise McNerney
Merits Clerk
United States Supreme Court
Washington, D.C.

Re: Case No. 01-896
Ford Motor Co., *et al.* v. McCauley, John B., *et al.*

Dear Ms. McNerney:

We are writing in response to the Order of September 13, 2002.

The Order asks the parties to address the issue:

> "Is there appellate jurisdiction when petitioners, as the nominally prevailing party in the district court, appeal the district court's dismissal of a complaint for lack of subject matter jurisdiction?"

In the district court, the petitioners did not prevail. They urged the district court to retain jurisdiction, and the district court declined to do so. In essence, the petitioners always sought federal court jurisdiction, and when the court declined jurisdiction, petitioners appealed. Thus, the premise of the question is, with the utmost respect, confusing. We would like to be responsive to the Court's concerns, so we bring this to your attention.

Sincerely,
/s/ Steve W. Berman
Steve W. Berman

SWB:slt

cc: Walter E. Dellinger (via facsimile)